FILED
FEB 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1225

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

Robert L. Krause,

*Petitioner,*

v.

Mark K. Kim, M.D., d/b/a Mark K. Kim, M.D., P.A., Metropolitan Medical Center, a corporation, Lawrence A. Farber, M.D. and Noran Neurological Clinic, P.A.,

*Respondents.*

## BRIEF IN OPPOSITION OF RESPONDENTS DR. FARBER AND NORAN CLINIC TO PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

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1987—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

## QUESTION PRESENTED

Where petitioner, a pro se litigant in a medical malpractice case whose claim was previously dismissed under the state statute of limitations and was affirmed on appeal to the Minnesota Appellate Courts, thereafter filed a motion to vacate under the Minnesota Rules of Civil Procedure which fails to present any federal question to the state appellate courts, which is decided adversely to his position upon independent and adequate state grounds and which is grounded upon an underlying claim which is non-actionable as a matter of law, should his petition for a writ of certiorari properly be denied?

The Court should hold: In the Affirmative.

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## BRIEF IN OPPOSITION OF RESPONDENTS DR. FARBER AND NORAN CLINIC TO PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

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### STATEMENT OF THE CASE

Petitioner Robert Krause commenced this action for medical malpractice against respondents Dr. Lawrence Farber and Noran Neurological Clinic in state court by service of a Summons and Complaint on November 8, 1982. At about the same time, plaintiff commenced a related action against respondents Dr. Kim and Metropolitan Medical Center. Dr. Farber, a neurologist who practices at Noran Neurological Clinic, commenced treat-

ing plaintiff in 1978 following a car accident. The records established that the last date of plaintiff's treatment by Dr. Farber was on July 10, 1980, as confirmed by plaintiff's deposition and the medical records.

Respondents Dr. Farber and Noran Clinic moved for summary judgment of dismissal under the two year statute of limitations for medical malpractice, Minn. Stat. §541.07, alleging that the claim was time-barred, as it was not commenced on or before July 11, 1980. By order dated January 21, 1985, the Honorable Robert Bowen, Hennepin County District Court, State of Minnesota, dismissed the claims against Dr. Farber, Noran Clinic and others under the statute of limitations. (Petitioner does not claim that the trial court failed to accept, at the time of that hearing, any documents that are at all relevant to his claim against Dr. Farber and the Noran Clinic.) Judgment was entered on February 27, 1985, from which plaintiff appealed. As the summary judgment motion had not been transcribed, the record was supplemented pursuant to Rule 110.03 of the Minnesota Rules of Civil Appellate Procedure, in the form of a statement of the record that was approved by the trial court.

The Minnesota Court of Appeals affirmed the dismissal of the claims against Dr. Farber and Noran Clinic. 379 N.W.2d 93 (Minn.Ct.App. 1985). Further review was denied by the Minnesota Supreme Court. *Id.* The appeal in the companion case was also dismissed and further review was denied. 379 N.W.2d 91 (Minn.Ct.App. 1985) *pet. for rev. den.*

Petitioner also filed a motion to vacate the trial court's order of January 21, 1985, and the resulting judgment of dismissal entered February 27, 1985. The denial of that

motion precipitated the instant certiorari petition. Petitioner sought to vacate the original order and underlying judgment, citing Rule 60 of the Minnesota Rules of Civil Procedure, governing the vacation of orders and judgments. Petitioner alleged that the underlying order and judgment should be vacated due to clerical error and misrepresentation.

At the hearing before Judge Bowen on March 20, 1986, plaintiff was given a full and fair opportunity to argue his motion for over one hour. He presented only issues that had previously been argued and briefed to the trial court and the Minnesota appellate courts, such as that the trial court should have initially granted a continuance on the summary judgment motions and that the trial court should have allowed the filing of several additional exhibits, none of which pertained to the claims against Dr. Farber and the Noran Clinic. No new grounds for further relief were presented. Petitioner's moving papers made passing reference to several constitutional provisions, although it was unclear as to whether petitioner was referring to the Minnesota or to the federal Constitution. The trial court denied petitioner's motion to vacate the dismissal as to all defendants by order filed March 21, 1986.

Plaintiff thereafter filed a notice of appeal as to all parties but did not present his constitutional claims to the Minnesota appellate courts. On June 3, 1986, on respondents' motions to dismiss, the Minnesota Court of Appeals dismissed petitioner's second appeal as being taken from a non-appealable order. The Court of Appeals' order granting the motion to dismiss did not rely on any federal constitutional grounds, but rather, rested

solely upon the Minnesota Rules of Civil Procedure and the Minnesota Rules of Civil Appellate Procedure and cases construing the rules. The Minnesota Supreme Court declined to grant further review and also denied petitioner's motion for a rehearing. No federal questions were addressed. Petitioner now seeks relief from this Court.

## REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied for several separate and independent reasons: First, the Court lacks jurisdiction pursuant to 28 U.S.C. §1257(3) because petitioner did not present any federal question to the Minnesota trial court or to the Minnesota appellate courts; second, the Court lacks jurisdiction because the decisions below rest upon adequate and independent state grounds; and third, the decisions below are of limited significance and application and were, in any event, correctly decided under controlling state law.

Petitioner alleges that jurisdiction is conferred under 28 U.S.C. §1257(3). Nevertheless, it is well settled that the jurisdiction of this Court to reexamine a final judgment of a state court can arise only if the record as a whole shows, either expressly or by clear implication, that the federal claim was adequately presented throughout the state court system. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 17 S.Ct. 709, 41 L.Ed. 1149 (1897). If the federal question was presented to the lower state courts but not properly preserved on appeal to higher state courts, the requirement that the issue be presented to the highest state court has not been satisfied. *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 68 S.Ct. 682, 92 L.Ed.

863 (1948). Thus, while petitioner at least mentioned several constitutional grounds to the lower court, there is no evidence—either of record or outside of the record —to show that any federal question was presented to the Minnesota Supreme Court. Petitioner has failed to satisfy the threshhold jurisdictional requirement and his petition for writ of certiorari must be denied.

The petition should be denied for a second and additional basis: The decision rests upon adequate and independent state grounds. The Supreme Court has no power to revise or review judgments of state courts on questions of state law. *Henry v. State of Mississippi*, 379 U.S. 443, 85 S.Ct. 546, — L.Ed.2d — (1965). The doctrine that the Supreme Court will decline to review state court judgments which rest on independent and adequate state grounds is necessary to avoid the issuance of advisory opinions. *Id.* Further, federal courts lack authority to function as an appellate arm of state courts. *Pilkinton v. Pilkinton*, 389 F.2d 32 (8th Cir.) *cert. den.* 392 U.S. 906, 88 S.Ct. 2057, 20 L.Ed.2d 1364 (1968). Petitioner's initial complaint is with the procedure employed by the trial court to rule on his motion to vacate under Rule 60 of the Minnesota Rules of Civil Procedure. The Minnesota Rules, including Rule 60, are patterned after the Federal Rules of Civil Procedure, and the Minnesota Rules governing civil procedure have been upheld as constitutional and not in violation of federal rights. *Solum v. Farmers and Merchants Nat. Bank*, 269 Minn. 431, 131 N.W.2d 231 (1964). It is equally clear that petitioner's complaints about Rule 56 of the Minnesota Rules of Civil Procedure, governing summary judgment, regarding the Minnesota Rules of Civil Appellate Procedure

and regarding the two year statute of limitations for medical malpractice do not present federal questions, so that the decision below is sustainable on adequate and independent state court grounds.

Even if the propriety of the trial court's initial granting of summary judgment was reviewable by this Court, there can be no dispute that petitioner was not denied his right to a jury trial or any other federal rights. In *Fidelity and Deposit Co. v. United States,* 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed. 194 (1902), this Court upheld as constitutional the summary granting of a judgment upon motion:

> If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.

187 U.S. at 320, 23 S.Ct. at 122. Similarly, the Court has recently reaffirmed the continuing viability of summary judgment under the Federal Rules of Civil Procedure. *See Celotex Corp. v. Catrett,* — U.S. —, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* — U.S. —, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Co. v. Zenith Radio Corp.,* 475 U.S. —, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In summary, the decision below is sustainable on adequate and independent state grounds and was correct as a matter of law. No federal question was presented to the Minnesota appellate courts.

## CONCLUSION

For the foregoing reasons, respondents Dr. Lawrence Farber and Noran Neurological Clinic respectfully request that the Court deny the petition for writ of certiorari.

DATED. February 16, 1987.

Respectfully submitted,

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